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SUPREME COURT, U.S.

No. 82 5028

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

HORACE BUTLER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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QUESTIONS PRESENTED

I

Where the state is required to prove the existence of a statutory aggravating circumstance beyond a reasonable doubt as a prerequisite for imposition of the death penalty, are the Eighth and Fourteenth Amendments violated by jury instructions which define the term "reasonable doubt" as "not a fanciful, not a whimsical, but a substantial doubt," as "a substantial doubt for which an honest person seeking the truth can give a real reason," and as "not a weak or slight doubt, but...a serious or strong or substantial well-founded doubt as to the truth of the matters asserted by the state"?

II

Do the Eighth and Fourteenth Amendments require application of the standard of evidentiary sufficiency set forth in Jackson v. Virginia, 443 U.S. 307 (1979), to the evidence of the statutory aggravating circumstance which forms the factual basis of petitioner's sentence of death?

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HORACE BUTLER,

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v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF SOUTH CAROLINA

Petitioner Horace Butler prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of South Carolina in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported in State v. Butler, ___ S.C. ___, 290 S.E.2d 1 (1982) and is attached hereto as the Appendix to this Petition.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on February 22, 1982. Timely petitions for rehearing and for a stay of execution were denied on April 6, 1982. On May 26, the Chief Justice of the United States extended the time for filing of this petition for writ of certiorari to and including July 6, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having arrested below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the Constitution of the United States, which provides in pertinent

part:

"nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

"No state shall...deprive any person of life, liberty or property without due process of law..."

2. This case also involves the following provisions of the Code of Laws of South Carolina:

S.C. Code §16-3-20. Punishment for murder: spearate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder shall be punished by death or by imprisonment for life and shall not be eligible for parole until the service of twenty years, notwithstanding any other provisions of law. Provided, however, that notwithstanding the provisions of this section, under no circumstances shall a female who is pregnant with child be executed so long as she is in that condition.

(B) Upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If the trial jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment. Only such evidence in aggravation as the State has made known to the defendant in writing prior to the trial shall be admissible. This section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant and his counsel shall be permitted to present arguments for or against the sentence of death. The defendant and his counsel shall have the closing argument regarding the sentence imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any of the following statutory aggravating and mitigating circumstances which may be supported by the evidence:
(a) Aggravating circumstances:
(1) Murder was committed while in the commission of the following crimes or acts: (a) rape, (b) assault with intent to ravish, (c) kidnapping, (d) burglary, (e) robbery while armed with a deadly weapon, (f) larceny with use of a deadly weapon, (g) housebreaking, and (h) killing by poison and (i) physical torture;

(2) Murder was committed by a person with a prior record of conviction for murder;
(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;
(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;
(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty;
(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;
(7) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.
(b) Mitigating, circumstances:
(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.
(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance;
(3) The victim was a participant in the defendant's conduct or consented to the act;
(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor;
(5) The defendant acted under duress or under the domination of another person;
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
(7) The age or mentality of the defendant at the time of the crime;
(8) The defendant was provoked by the victim into committing the murder;
(9) The defendant was below the age of eighteen at the time of the crime.

The statutory instructions as to aggravating and mitigating circumstances shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. The trial judge, prior to imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment. In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant

found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous.

* * * * *

S.C. Code §16-3-25. Punishment for murder: review by Supreme Court of imposition of death penalty.

(A) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of South Carolina. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of South Carolina together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of South Carolina.

(B) The Supreme Court of South Carolina shall consider the punishment as well as any errors by way of appeal.

(C) With regard to the sentence, the court shall determine:
(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in §16-3-20, and
(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(D) Both the defendant and the State shall have the right to submit briefs within the time provided by the court and to present oral arguments to the court.

(E) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:
(1) Affirm the sentence of death; or
(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of South Carolina in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration. If the court finds error prejudicial to the defendant in the sentencing proceeding conducted by the trial judge before the trial jury as outlined under Item (B) of §16-3-20, the court may set the sentence aside and remand the case for a resentencing proceeding to be conducted by the same or a different trial judge and by a new jury impaneled for such purpose. In the resentencing proceeding, the new jury, if the defendant does not waive the right of a trial jury for the resentencing proceeding, shall hear evidence in extenuation, mitigation or aggravation of the punishment in addition to any

evidence admitted in the defendant's first trial relating to guilt for the particular crime for which the defendant has been found guilty.

(F) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on all legal errors, the factual substantiation of the verdict, and the validity of the sentence.

STATEMENT OF THE CASE

Petitioner was tried for and convicted of the murder of Pamela Lane. In accordance with South Carolina's capital sentencing statute, S.C. Code §§16-3-20 et seq., which is closely patterned after the Georgia death penalty statute considered by this Court in Gregg v. Georgia, 428 U.S. 153 (1976), a separate sentencing proceeding was conducted before the trial jury at which the state was required to prove beyond a reasonable doubt the existence of at least one statutory aggravating circumstance as a precondition for imposition of the death penalty. The state alleged the existence of two such statutory aggravating circumstances, which were that Miss Lane's murder had been committed while in the commission of rape and kidnapping.

The evidence tended to establish that Miss Lane had left work in the direction of her home late on the night of July 17, 1980. She was riding a Moped motorized bicycle. Tr. 530-5. The route home covered approximately eighteen miles and passed through a remote rural area. Miss Lane's body was found the following day a short distance from the main highway. Tr. 524-5. Petitioner was charged with her murder some weeks later. Tr. 785-7. In the second of two statements which he gave to police, he stated that he had met Miss Lane on her way home, and that she had agreed to accompany him to a secluded area where she had voluntarily engaged in sexual relations with him. He stated that Miss Lane had subsequently told him that she would claim that he had raped her, whereupon he panicked and shot her. Tr. 798-800. Petitioner is black, and Miss Lane was white.

The evidence upon which the state relied at petitioner's sentencing hearing to prove the statutory aggravating circum-

stances of rape and kidnapping was entirely circumstantial, and consisted of the following:

1) The deceased had been shot in the chest, Tr. 595-6, and had received a blow to the head prior to death which was inconsistent with an injury from a fall.

2) Semen was found in the vagina of the deceased. Tr. 598.

3) Petitioner gave a confession to the effect that the deceased engaged in consensual sexual relations with him, that she told him that she was going to accuse him of raping her, and that he thereupon panicked and shot her. Tr. 799.

4) Petitioner and the deceased were apparently strangers to one another prior to the night of this incident.

5) Petitioner was, according to his confession, in possession of a pistol at the time of his encounter with the deceased. Tr. 799.

The evidence also established the following circumstances which did not tend to prove rape:

1) The deceased had no signs of trauma or injury to her external or internal genitalia. Tr. 609.

2) The clothes of the deceased, including her underwear, were in place and showed no evidence of injury other than the bullet wound. Tr. 593-4, 606-7.

3) Petitioner's statement was to the effect that the deceased had consented to have sexual relations with him. Tr. 799.

4) There was no damage to the Moped which the deceased had been riding on the night of her death, or any other indication that the Moped had been pushed or forced off the road.[1]

In considering this evidence after the jury had found petitioner guilty of murder,[2] the trial judge stated that he

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[1] An additional unexplained circumstance was that a Negroid pubic hair which could not have come from petitioner was found on Miss Lane's blouse. Tr. 657.

[2] The state introduced no evidence at petitioner's sentencing hearing, and relied entirely on the evidence previously introduced at the guilt-or-innocence phase of the trial.

was "extremely dubious" as to whether the state had made out a case of either rape or kidnapping sufficient to go to the jury. Tr. 953. The prosecutor conceded that the evidence of kidnapping and rape was entirely circumstantial, but asserted that the alleged unbelievability of petitioner's claim of consent was sufficient, when combined with the autopsy evidence, to establish the aggravating circumstances of rape and kidnapping beyond a reasonable doubt. Tr. 953-5. After a brief recess, the trial judge indicated that he had changed his mind as to the sufficiency of the evidence of rape. Tr. 964-5. Prior to the beginning of petitioner's sentencing hearing, however, the trial judge ruled that the state's evidence of kidnapping was insufficient to establish that circumstance, and that it would therefore not be submitted to the jury. Tr. 972-5.

Having decided to submit to the jury the question of whether rape had been proven beyond a reasonable doubt, the trial judge undertook to instruct the jury as to the meaning of the term "proof beyond a reasonable doubt." In attempting to do so, he instructed the jury as follows:

> ...You are now going to be required to make a determination as to whether the state has proven by the evidence which it has already put in and which is properly before you, and that is what you will make your inquiry relative to, have they proven by that evidence beyond a reasonable doubt every material element of the act of rape. Bear in mind that they must prove the existence of those elements beyond a reasonable doubt and you will recall from my earlier instructions the definition of reasonable doubt, that it is not a fanciful, not a whimsical, but a substantial doubt for which an honest person seeking the truth can give a real reason.

Tr. 1022 (emphasis added). The earlier instructions to which the trial judge alluded had been given two days previously in his guilt phase charge to the jury, and consisted of the following:

> Now, when I use the term "reasonable doubt," it means basically the same thing in the law as it does in everyday English language and that is a doubt for which you have a real reason, not a frivolous doubt, not a whimsical, fanciful doubt, because you can doubt any proposition if you wanted to, but a reasonable doubt is a substantial doubt for which an honest person seeking the truth can give a real reason.

Tr. 940-1 (emphasis added). Finally the trial judge again defined reasonable doubt at the end of his instruction on cir-

cumstantial evidence:

> The two phrases "beyond a reasonable doubt" and "proof to a moral certainty" are basically synonymous and they are the legal equivalent of each other. These phrases, however, connot a degree of proof which is distinguished from an absolute certainty. Proof beyond a reasonable doubt, which the law in its mercy requires for the benefit of the accused, is not a weak or slight doubt, but it is a serious or strong or substantial well-founded doubt as to the truth of the matters asserted by the state.

Tr. 1026-7 (emphasis added). After receiving these instructions, the jury determined that the state had established the statutory aggravating circumstance of rape beyond a reasonable doubt, and sentenced petitioner to death.

On appeal, the South Carolina Supreme Court affirmed the conviction and sentence, rejecting petitioner's challenge to the reasonable doubt instructions. See How the Federal Questions were Raised and Decided Below, infra. The court also dismissed petitioner's claim that the state's evidence of rape was constitutionally insufficient to support the jury's finding and sentence. Although petitioner's argument concerning the sufficiency of the evidence had been based on the standard of review enunciated by this Court in Jackson v. Virginia, 443 U.S. 307 (1979), Brief of Appellant at 38, the state Supreme Court declined to apply the Jackson standard to the evidence of rape, affirming the death sentence instead on the basis that "any evidence direct or circumstantial reasonably tending to prove the guilt of the accused creates a jury issue." State v. Butler, ___ S.C. ___, 290 S.E.2d 1, 4 (1982) (emphasis in original).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. Petitioner did not object at his trial to the challenged instructions, which were substantially in accordance with long-settled South Carolina law.[3] On appeal to the South Carolina Supreme Court, petitioner argued that the trial court's definition of reasonable doubt so weakened and diluted that

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[3] South Carolina has no contemporaneous objection rule in capital cases. State v. (James) Butler, ___ S.C. ___, 290 S.E.2d 420 (1982); State v. Adams, ___ S.C. ___, 283 S.E.2d 582 (1981).

legal concept as to have violated the Fourteenth Amendment principle of In re Winship, 397 U.S. 358 (1970). In addition, he argued that these instructions violated the Eighth Amendment by "injecting 'a level of uncertainty and unrealiability into the fact-finding process that cannot be tolerated in a capital case,'" State v. Butler, Brief of Appellant at 48, quoting Beck v. Alabama, 447 U.S. 625 (1980), and pointed out that these instructions came at precisely the point in his trial where "the weakness of the state's case (and the undeniable danger of impermissible racial considerations in the jury's deliberations on the crucial issue of consent) made strict adherence to the reasonable doubt standard most critical." Id. Following submission of the briefs, the South Carolina Supreme Court reaffirmed its approval of the equation of "reasonable doubt" with "strong substantial doubt" in State v. Griffin, ___ S.C. ___, 285 S.E.2d 631, 634 (1981). In the light of State v. Griffin, petitioner sought and was granted leave to argue on Eighth Amendment grounds that Griffin should be modified so as to apply only to non-capital cases. State v. Butler, Petition to Argue for Modification of Precedent, filed November 23, 1981.After hearing oral argument on the question, the Supreme Court of South Carolina affirmed the conviction and death sentence, stating that the reasonable doubt instructions given at trial were "well within the guidelines set by this Court and In re Winship." 290 S.E.2d at 4.

II. After the state anncunced prior to the start of petitioner's sentencing hearing that it would present no additional evidence, petitioner moved for a directed verdict on the grounds that the evidence to support the statutory aggravating circumstances of rape and kidnapping was insufficient tc support a jury finding that either circumstance had been proven beyond a reasonable doubt. In so doing, petitioner cited and relied upon Jackson v. Virginia, 443 U.S. 307 (1979). Tr. 961-2. The trial judge granted the motion as to the kidnapping circumstance, but ultimately denied it as to the rape circumstance.

On appeal to the South Carolina Supreme Court following imposition of a death sentence, petitioner again challenged the sufficiency of the evidence of rape under the Jackson v. Virginia standard, Tr. 1122-3, Exception 10, and argued that application of this standard of review to the sufficiency of the evidence of a statutory aggravating circumstance was mandated by the Eighth Amendment's requirement of special reliability in the determination that death is the appropriate punishment in a particular case. Brief of Appellant at 38. In affirming the death sentence, the Supreme Court of South Carolina rejected petitioner's sufficiency argument on the basis that the trial court was concerned "only with the existence of evidence, not its weight," and that "[a]ny evidence direct or circumstantial reasonably tending to prove the guilt of the accused presents a jury issue." State v. Butler, ___S.C.___, 290 S.E.2d 1, 4 (1982) (emphasis in original). The court's discussion included no reference to Jackson v. Virginia or to the standard of review enunciated in that case, and relied on two pre-Jackson South Carolina cases, State v. Hill, 268 S.C. 390, 234 S.E.2d 219, cert. den. 434 U.S. 870 (1977), and State v. Gunter, 273 S.C. 347, 256 S.E.2d 317 (1979), as authority for its reliance on the "any evidence" standard of review in petitioner's case.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER, IN THIS CAPITAL CASE, THE TRIAL COURT'S DEFINITIONS OF REASONABLE DOUBT SO DILUTED AND WEAKENED THAT PRINCIPLE AS TO HAVE EXCEEDED THE LATITUDE ENJOYED BY STATE COURTS IN INSTRUCTING JURIES CONCERNING FUNDAMENTAL RIGHTS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS.

In In re Winship, this Court established that the Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Id. at 364. It follows from Winship that "[i]n the administration of criminal justice, courts

must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." Estelle v. Williams, 425 U.S. 501, 503 (1976). Although Winship and Williams were concerned with the determination of guilt rather than with sentencing, there can be no doubt that their affirmation of the constitutional indispensibility of the reasonable doubt standard applies a fortiori to any factual determination upon which the decision to impose the death penalty is based.[4] Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, J.J.). This case presents the question of whether, in a capital sentencing trial where the state's proof is circumstantial and tenuous, jury instructions which purport to define the reasonable doubt standard can so dilute the effect of that constitutional guarantee as to violate the Eighth and Fourteenth Amendments.

In making this argument, petitioner recognizes the limited function that this Court fulfills in reviewing claims of error in state criminal trial jury instructions such as those at issue here. Cupp v. Naughten, 414 U.S. 141 (1973). His claim is not merely that each of the three separate definitions of reasonable doubt given by the trial judge was "undesirable, erroneous, or even 'universally condemned'." Id. at 146. Rather, he contends that this case presents the relatively rare situation in which the cumulative effect of a whole series of such instructions has been to relieve the prosecution of the burden of proof imposed on it by the Eighth and Fourteenth Amendments to the Constitution of the United States. He also contends that even if these instructions might have passed constitutional scrutiny in a non-capital case, they nevertheless violated the Eighth Amendment by unnecessarily reducing the reliability of the factual determination that petitioner should suffer the punishment of death. Gardner v. Florida, 430 U.S. 349 (1977).

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[4] This conclusion is all the more unavoidable where, as here, the applicable statutory sentencing framework itself requires that any aggravating circumstances relied upon for imposition of the death penalty be established beyond a reasonable doubt. S.C. Code §16-3-20(C) (1976).

In Taylor v. Kentucky, the Court observed that a state trial court's definition of reasonable doubt as "'a substantial doubt, a real doubt'...though perhaps not in itself reversible error, often has been criticized as confusing. [citations omitted]." 436 U.S. 478, 488 (1978). Such criticism had been heard for many years. As the Supreme Court of Tennessee observed in Frazier v. State, 117 Tenn. 430, 100 S.W. 94, 103 (1907), the words "reasonable doubt" convey "their own unmistakable meaning, and...the cumulative effect resulting from the reiteration of the same idea by the use of such words and phrases as 'well-founded doubt', 'substantial doubt', and others of like meaning, is well calculated to fritter away and destroy all benefit to be derived from this important rule of law." Since In re Winship, this view has gained widespread acceptance.[5] The reason for this trend, of course, stems from the plain fact that in modifying the word "doubt," "substantial" (like "strong" or "serious" or "well-founded") simply does not mean the same thing as "reasonable." In considering a recent noncapital case involving only the use of the word "substantial," the Supreme Court of Tennessee put the matter this way:

> We think that there is a significant difference between "reasonable" doubt and "substantial" doubt. The word substantial, according to Webster's New World Dictionary (1961), means "real; actual; true; strong; solid; firm; ample; large; or of substantial value". We think that when consideration is given to the definition and ordinary meaning of this word, there is little doubt but that its use tends to lessen the State's burden and as a natural corollary to increase the burden upon the defendant...

Smith v. State, 547 S.W.2d 925 (1977). A similar point was made somewhat more vividly by Justice Seiler of the Missouri Supreme Court in his concurring opinion in State v. Davis,

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[5] The Fifth, Sixth, Seventh and Eighth Circuits and the United States Court of Military Appeals have held the "substantial doubt" instruction to be error. United States v. Rodriguez, 585 F.2d 1234 (5th Cir. 1978); United States v. Christy, 444 F.2d 448 (6th Cir. 1971), cert.den. 404 U.S. 949; United States v. Wright, 542 F.2d 975 (7th Cir. 1976), cert.den. 429 U.S. 1073; United States v. Atkins, 487 F.2d 257 (8th Cir. 1973); United States v. Cotten, 10 M.J. 260 (CMA 1981). Post-Winship state court decisions rejecting or disapproving the instruction include Laird v. State, 251 Ark. 1074, 476 S.W.2d 811 (1972); State v. Harrison, 149 N.J.Super. 220, 373 A.2d 680 (A.D. 1974); State v. Thorpe, ___ R.I. ___, 429 A.2d 785 (1981); Smith v. State, 547 S.W.2d 925 (Tenn. 1977); State v. McDonald, 89 Wash.2d 190, 571 P.2d 930 (1977). But see United States v. Magnano, 543 F.2d 431 (2d Cir. 1976), cert.den. 429 U.S. 1091; United States v. Smith, 468 F.2d 381 (3d Cir. 1972); Stirpano v. State, 287 A.2d 394 (Del. 1972); State v. Davis, 482 S.W.2d 486 (Mo. 1972).

482 S.W.2d 486, 490 (1972):

> 'Reasonable' and 'substantial' are not synonymous, as can be seen by referring to any of the standard dictionaries. The point was well put by counsel in argument recently where he pointed out that if one had to undergo a serious operation and were querying the doctor as to the prospects for a successful outcome, how differently the person would feel if the doctor told him there was only a reasonable chance of success as opposed to being told that there was a substantial chance of success.

Justice Seiler's hypothetical surgery patient would no doubt have gained even greater comfort from the assurance that his operation's prospects for success, far from being merely "reasonable", had now become not only "substantial" but also "strong" or "well-founded". Not one of these words is in any respect synonomous with the term which they were used to define, and when they were strung end to end, the definition which resulted diluted the reasonable doubt standard far beyond that level of "utmost certainty" upon which the "moral force of the criminal law" depends. In re Winship, 397 U.S. 358, 364 1970).

The prejudicial effect of this definition was exacerbated here by the trial judge's additional instruction that "a reasonable doubt is a substantial doubt for which an honest person seeking the truth can give a real reason." Tr. 1022; and see also Tr. 940-1. Quite apart from its use of the word "substantial," this instruction was improper because it suggested that even if the state's proof has simply not persuaded a juror, his resulting doubt was not "reasonable" unless he was also able to articulate a reason for it. It is for this reason that such instructions have been disapproved by the courts of most jurisdictions which have considered them.[6] The reasoning behind

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[6]Dunn v. Perrin, 570 F.2d 21 (1st Cir. 1978); United States v. Davis, 328 F.2d 864 (2d Cir. 1964); United States v. Harris, 346 F.2d 182 (4th Cir. 1965); Bernstein v. United States, 234 F.2d 475 (5th Cir. 1956); Pettine v. Territory of New Mexico, 201 F. 489 (8th Cir. 1912); State v. Taylor, 76 Idaho 358, 283 P.2d 582 (1955); Sulie v. State, 379 N.E.2d 455 (Ind. 1978); State v. Cohen, 108 Iowa 208, 78 N.W. 857 (1899); State v. Maxwell, 328 A.2d 801 (Me. 1974); Commonwealth v. Robinson, 415 N.E.2d 805 (Mass. 1981); State v. Newman, 93 Minn. 393, 101 N.W. 499 (1904); Isaacks v. State, 337 So.2d 928 (Miss. 1976); State v. Rosenburg, 118 A. 207 (N.J. 1922); Commonwealth v. Custer, 145 Pa.Super. 535, 21 A.2d 524 (1941); Owens v. Commonwealth, 186 Va. 689, 43 S.E.2d 895 (1947); State v. Keffer, 281 S.E.2d 495 (W.Va. 1981); but see State v. Derrico, 181 Conn. 151,

(Footnote continued on next page)

this disapproval was forcefully set out by the Eighth Circuit in Pettine v. Territory of New Mexico, 201 F. 489 (1912):

> The ability to give sound reasons for their doubts or their beliefs is not given to many men, and every prudent and thoughtful man at once recognizes the fact that in the graver and more important affairs of his own life doubts for which he can formulate no convincing reason often induce him to act or to refuse to act. To require every person accused of crime to present such a state of evidence at his trial that every juror can give a sound reason based on the testimony for his doubt of his guilt before he may vote for his acquittal places too heavy a burden on the accused. It destroys the rule of reasonable doubt, and substitutes for a reasonable doubt a demonstrable doubt logically and conclusively sustained by the evidence or the want of it.

201 F. at 496-7.[7]

It is not petitioner's purpose to press upon this Court the question of whether each of these instructions, considered in isolation, should or should not be given in state criminal trials. He does contend, however, that the cumulative effect of the trial judge's repeated attempts to "define" the reasonable doubt standard by diluting the quantum of certainty required to justify a finding for the prosecution was such as to violate the Fourteenth Amendment, and warrants review by this Court. No matter how much latitude the states may enjoy in

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(Footnote 6 continued)

434 A.2d 356 (Conn. 1980); Powers v. State, 150 Ga.App. 25, 256 S.E.2d 637 (1979); State v. Osbey, 213 Kan. 564, 517 P.2d 141 (1973); People v. Turner, 99 Mich.App. 233, 298 N.W.2d 848 (1980).

[7]Similarly, in considering an instruction that a reasonable doubt was one "which one should be able to express a good and substantial reason therefore," the Virginia Supreme Court pointed out that

> [t]he language employed is susceptible of the interpretation that a juror must be able to formulate or express in words the reason for the doubt which may be in his mind before it can be classed as reasonable. A juror may entertain a reasonable doubt as to the guilt of the accused although he may be unable to formulate or express it in words. He may be unconvinced by the evidence and yet unable "to give a good and substantial reason," or, indeed to express any reason for the result of his mental process. If such doubt be honestly entertained the juror should vote for acquittal.

Owens v. Commonwealth, 186 Va. 689, 43 S.E.2d 895, 902 (1947).

the formulation of jury instructions for criminal trials, it is obvious that where the federal Constitution imposes the obligation on a state trial judge to instruct a jury on a particular legal principle, In re Winship, 397 U.S. 358 (1970), Taylor v. Kentucky, 436 U.S. 478 (1978), Carter v. Kentucky, 450 U.S. 288 (1981), the words actually spoken to the jury must fairly convey the substance of the principle involved. There are, in other words, outer limits to the latitude of state courts in devising jury instructions concerning rights guaranteed by the Fourteenth Amendment. So far as petitioner is aware, this Court has never before had occasion to demarcate any such outer limit beyond which an instruction purporting to embody an essential federal constitutional right may not go. Given the still substantial disagreement among American jurisdictions concerning the various definitions of reasonable doubt involved in this case, see notes 5 and 6, supra, petitioner submits that this area is one where the constitutional outer limit of such instructions should now be demarcated by this Court.

This case is an appropriate occasion for such a consideration of the minimum constitutional standards for jury instructions on reasonable doubt, since its facts provide a particularly stark example of the prejudice that can result from the dilution of the reasonable doubt principle. Petitioner was charged at his sentencing hearing with interracial rape, on evidence so tenuous that the trial judge at first announced that he would direct a verdict in petitioner's favor. Among petitioner's defenses to the charge was consent. Thus both the state's evidence and petitioner's defense inevitably forced the jury to confront the question of what sorts of doubts might be classified as "reasonable" doubts. The trial judge answered that question by informing the jury that a reasonable doubt was only such doubt as could also be described as "substantial," "serious," "strong" or "well-founded," and for which the jurors could "give a real reason." Whatever doubts the jury may otherwise have entertained were not likely to survive such an onslaught of explanation, nor did they.

Unlike the merely confusing reasonable doubt instructions criticized in Holland v. United States, 348 U.S. 121, 140 (1954), the instructions given here were indeed "of the type that could mislead the jury into finding no reasonable doubt when in fact there was some." Their effect, in short, was to deny petitioner the full protection of the reasonable doubt standard in the determination that he had committed a crime punishable by death.

II. THE COURT SHOULD GRANT THE WRIT TO CONSIDER THE APPLICABILITY OF JACKSON V. VIRGINIA, 443 U.S. 307 (1979) TO CAPITAL SENTENCING PROCEEDINGS.

As noted above, South Carolina's capital sentencing procedures prohibit imposition of the death penalty except upon a finding by the sentencing authority that at least one statutory aggravating circumstance has been established by proof beyond a reasonable doubt. S.C. Code §16-3-20(c) (1976). Any such holding, moreover, must be reviewed by the Supreme Court of South Carolina in order to ensure that the evidence supports the sentencer's finding of a statutory aggravating circumstance. S.C. Code § 16-3-25(c)(2). This case presents the question of whether the Eighth and Fourteenth Amendments permit the carrying out of a sentence of death imposed on the basis of evidence which was not, and which has never been found to be, sufficient to convince any rational trier of fact beyond a reasonable doubt.

In Jackson v. Virginia, 443 U.S. 307 (1979), the Court observed that the "no evidence" rule of Thompson v. Louisville, 362 U.S. 199 (1960), was "simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt," and held that a habeas corpus petitioner has been denied due process where the evidence upon which his state conviction rests was such that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." 443 U.S. at 320-1, 324. In view of this Court's repeated insistence that the decision to impose death as punishment requires procedures which ensure particular reliability, Woodson v. North Carolina, 428 U.S. 280 (1976), Gardner v. Florida, 430 U.S. 349 (1977),

Beck v. Alabama, 447 U.S. 625 (1980), it cannot seriously be argued that the evidence which forms the factual basis of a particular death sentence need not satisfy the Jackson standard, or that "any evidence" can satisfy the Eighth Amendment's requirement of "a meaningful basis for distinguising the few cases in which [the death penalty] is imposed from the many in which it is not." Furman v. Georgia 408 U.S. 238, 313 (1972) (White, J., concurring).

It is equally clear, however, that the Supreme Court of South Carolina applied precisely such an "any evidence" standard in affirming petitioner's sentence of death. The author of the opinion in petitioner's case, Justice Ness, was acutely aware of the difference between the "any evidence" and Jackson standards of review, since he authored a dissent in an unrelated non-capital murder case just nine days after the issuance of the opinion in State v. Butler which contains the following comparison between the two standards of review:

> Reviewing [the] evidence in the light most favorable to the State as required by the "any" evidence rule, State v. Bailey, 253 S.C. 204, 170 S.E.2d 376 (1969), I am convinced that the record is without "any" evidence to support appellant's conviction.
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> Moreover, viewing the evidence in accordance with the standard of appellate review mandated by the United States Supreme Court in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed 560 (1979), it is even more convincing the trial judge erred in refusing appellant's motion for a directed verdict. This standard of appellate review requires us to consider not whether there is "any" evidence to support the conviction, but whether viewing the evidence in the light most favorable to the prosecution, there is sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt.

State v. Stewart, ___S.C.____, ___S.E.2d___ (Opinion No. 21656, filed March 3, 1982) (Ness, J., dissenting). It is plain, then, that the court's reliance in petitioner's case on the pre-Jackson "any evidence" standard in its mandatory appellate review of the sufficiency of the evidence upon which his death sentence rests is the product not of oversight but of an erroneous rejection of the Jackson standard as the appropriate guideline for determining such sufficiency.

A review of the evidence in aggravation in this case, moreover, as summarized above at 6, reveals that petitioner's death sentence could not have withstood scrutiny under the Jackson standard. Regardless of whether the fact that Miss Lane engaged in sexual intercourse and was thereafter murdered might constitute "some evidence" that this sexual intercourse occurred during a rape by petitioner, the record as a whole simply cannot support a finding of rape by a rational trier of fact beyond a reasonable doubt. Accordingly, the constitutionally indispensible factual basis of petitioner's sentence of death simply has not been established with that degree of "utmost certainty" upon which "the moral force of the criminal law depends." In re Winship, 397 U.S. 358, 364 (1970). Even in a non-capital case, such a situation would be constitutionally intolerable. In a capital case such as this one, involving allegations of interracial murder and rape, the added danger that the death penalty may be inflicted on the basis of arbitrary and discriminatory considerations only makes adherence to and application of the strict standard of proof required by Jackson all the more indispensible.

Although the applicability of the Jackson standard to capital sentencing proceedings is implicit in this Court's whole jurisprudence of capital punishment since Furman, the Court has not yet had occasion expressly to apply Jackson in this context. Because the Supreme Court of South Carolina has erroneously rejected Jackson as the standard for review of the sufficiency of the evidence which constitutes the basis for petitioner's death sentence, the Court should grant his petition for a writ of certiorari, apply the legal standard which the Eighth and Fourteenth Amendments require, and vacate his sentence of death.

CONCLUSION

Petitioner prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

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July 6, 1982.